Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:FS:LI:POSTF-140764-02
TKerrigan

date: August 16, 2002

to: Territory Manager (Heavy Manufacturing & Transportation)
Attention: Group 1647-LMSB

from: Associate Area Counsel
CC:LM:FS:LI

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subject: [redacted]

EIN: [redacted]
Taxable year [redacted]
U.I.L. No. 0274.07-00

This memorandum responds to a July 29, 2002 request for assistance from Isaac Wachsman of your staff concerning a business expense deduction claimed by the taxpayer for the [redacted]. This memorandum should not be cited as precedent.

FACTS

The relevant facts, as we understand them, are as follows: In [redacted], the taxpayer [redacted]. The taxpayer claimed a deduction in the amount of $[redacted] on its Federal income tax return, which represents the [redacted] contract price paid for use of [redacted].

The revenue agent contends that [redacted] was an "entertainment facility" and the expenses are not deductible under I.R.C. § 274(a)(1)(B) because they were incurred with respect to such facility. The taxpayer's authorized representative counters that the use of [redacted] is akin to the use of stadium seating at a sporting event. Accordingly, [redacted] to observe an activity and the related expenses are subject to I.R.C.

§ 274(a)(1)(A). The representative also asserts that the legal analysis contained in two National Office Technical Advice Memoranda, that were issued on November 30, 1999 and June 29, 2000 to an unrelated taxpayer, support its contention that the taxpayer did not have exclusive use [redacted].

ISSUE

Whether expenses incurred by the taxpayer in connection with the use of [redacted] should be disallowed as expenses with respect to an I.R.C. § 274(a)(1)(B) entertainment facility?

LEGAL ANALYSIS

I.R.C. § 274(a) provides as follows:

> (a) Entertainment, amusement, or recreation.
>
> (1) In General. No deduction otherwise allowable under this chapter shall be allowed for any item--
>
> (A) Activity. With respect to an activity which is of a type generally considered to constitute entertainment, amusement, or recreation, unless the taxpayer establishes that the item was directly related to, or, in the case of an item directly preceding or following a substantial and bona fide business discussion (including business meetings at a convention or otherwise), that such item was associated with, the active conduct of the taxpayer's, trade or business, or
> (B) Facility. With respect to a facility used in connection with an activity referred to in subparagraph (A).

The primary inquiry is whether [redacted] is a "facility" as that term is used in I.R.C. § 274(a)(1)(B). We note that this term is not defined in the statute. However, Treas. Reg. § 1.274-2(e)(2), which applies to expenditures paid or incurred before January 1, 1979, states that a facility is "[a]ny item of personal or real property owned, rented, or used by a taxpayer ... if it is used ... for, or in connection with

entertainment".[1/] See also H. Rept. 1447, 87th Cong., 2d Sess. 19, 21 (1962). Examples of facilities used in connection with entertainment include yachts, hunting lodges, fishing camps, swimming pools, tennis courts, bowling alleys, automobiles, airplanes, apartments, hotel suites, and homes in vacation resorts. Treas. Reg. § 1.274-2(e)(2)(i). The examples enumerated in the regulation are also consistent with the examples cited in both S. Rept. 95-1263 (1978), 1978-3 C.B. (Vol. 1) 315, 473 and H. Conf. Rept. 95-1800 (1978), 1978-3 C.B. (Vol. 1) 521, 583.

A plain reading of the regulation and legislative history supports the agent's initial determination that [redacted] is a facility used in connection with entertaining within the meaning of I.R.C. § 274(a)(1)(B) and Treas. Reg. § 1.274-2(e)(2)(i) since it is specifically listed in the examples. This conclusion is further buttressed by relevant case law. In Harrigan Lumber Co. v. Commissioner, 88 T.C. 1562, 1566 (1987), aff'd without published opinion, 851 F.2d 362 (11th Cir. 1988) the court stated that the material difference between an entertainment activity that includes the use of real or personal property and an entertainment facility is whether the property used for the entertainment is occupied exclusively by the taxpayer during the entertainment. See also Ireland v. Commissioner, 89 T.C. 978 (1987) [Beachfront property with lodging facilities was a facility within the meaning of I.R.C. § 274(a)(1)(B)]; On Shore Quality Control Specialist v. Commissioner, T.C. Memo. 1996-95 [Lease of a ranch for hunting purposes constituted an entertainment facility, rather than an activity because taxpayer enjoyed exclusive rights to the ranch under the agreement]; Dodd v. Commissioner, T.C. Memo. 1992-341 [Hot air balloon constituted a facility used in connection with entertainment]. Here, the taxpayer had the exclusive use [redacted] for the stated rental period. Therefore, the taxpayer also satisfies the "exclusive use" requirement articulated in applicable case law. Accordingly, the rental expense claimed with respect to [redacted] should be disallowed under I.R.C. § 274(a)(1)(B).

[1/] Although Treas. Reg. § 1.274-2(e) indicates that it applies to expenditures paid or incurred before January 1, 1979, with respect to entertainment facilities, the Tax Court noted in Harrigan Lumber Co. v. Commissioner, 88 T.C. 1562, 1565 n.7 (1987), aff'd without published opinion, 851 F.2d 362 (11th Cir. 1988) that it did not believe that the drafters of the regulation intended to exclude the relevant guidance provided therein in connection with expenditures paid or incurred subsequent to December 31, 1978, with respect to entertainment facilities.

The taxpayer's attempt to characterize [redacted] of a sporting event, although creative, is not persuasive. The proferred assertion that the expenses should be treated similar to seating at a sport stadium is simply not supported by the regulation or legislative history. In fact, the legislative history, specifically provides for I.R.C. § 274(a)(1)(A) treatment for tickets to sporting events regardless of whether the tickets are purchased individually, in a series or by series, or by an equivalent fee which entitles the taxpayer to use a seat, skybox or other similar facility which provides a viewing area for such an event. See H. Conf. Rept. 95-1800 (1978), 1978-3 C.B. (Vol. 1) 521, 584. The Court in Harrigan Lumber noted in *dicta* that such use at a stadium would not constitute exclusive occupancy of the venue where the entertainment takes place. In the present case, the taxpayer is attempting to circumvent the statutory language by recasting its rental payment as an expenditure for tickets to a sporting event. The argument would be more convincing if the expense at issue actually reflected an admission payment [redacted] that was paid to the event organizers rather than a payment to the company's president for the use of [redacted].

Finally, the taxpayer's purported reliance on two technical advice memoranda is equally without merit.[2/] First, a technical advice memorandum is specifically limited to the facts of that case and has no precedential value. Second, the memoranda identified by the taxpayer's representative addressed a narrow question involving a family-owned corporation in connection with its use of a resort that was owned by the controlling shareholders and another family member. The specific issue discussed in the memoranda is not even present in the instant case. Accordingly, they are of limited value to the taxpayer's argument.

[2/] The taxpayer's representative referenced the following technical advice memoranda in his response to the revenue agent: (1) National Office Technical Advice Memorandum, Letter Ruling 200041001, November 30, 1999 and (2) National Office Technical Advice Memorandum, Letter Ruling 200041008, October 13, 2000. The memoranda concluded that expenses incurred by a family-owned corporation in connection with the use of an island resort for business meetings were deductible because the resort was not a "facility" within the meaning of I.R.C. § 274(a)(1)(B). The taxpayer did not own or have exclusive use of the resort during the tax year at issue. The second memorandum affirmed the conclusion reached in the prior memorandum and addressed whether the formal distinction between related taxpayers should be respected for purposes of the "exclusive use" analysis.

CONCLUSION

In conclusion, the statutory language, applicable regulations and reported case law support the adjustment by the revenue agent. In addition, the taxpayer has offered no credible authority for its position that the use of [redacted] is equivalent to the use of sporting event seating. Accordingly, we concur that [redacted] was an "entertainment facility" and the expenses should be disallowed under I.R.C. § 274(a)(1)(B).

This opinion is based upon the facts set forth herein. It might change if the facts are determined to be incorrect. If the facts are determined to be incorrect, this opinion should not be relied upon. You should be aware that, under routine procedures, which have been established for opinions of this type, we have referred this memorandum to the Office of Chief Counsel for review. That review might result in modifications to the conclusions herein. We will inform you of the result of the review as soon as we hear from that office. In the meantime, the conclusions reached in this opinion should be considered to be only preliminary.

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

If you have any questions or require further assistance, please contact Thomas Kerrigan at (516) 688-1742.

ROLAND BARRAL
Area Counsel

By: _____
JODY TANCER
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